No. [redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ALBERT A. LIST,

Petitioner,

against

LOUIS C. LERNER, individually and as doing business under the firm name and style of Lerner & Company, and as a Director of Fashion Park, Inc.,

JEROME LEWINE, EDMUND W. FITZGERALD, ARTHUR S. NEUMARK, ROBERT PARKES BARUCH, LEWIS D. RAABIN, E. MILO GREENE, STANLEY HESSE, WALTER CAMPBELL GIBSON, HENRY A. ZOELLER, ROBERT POLLAK, JEROME LEWINE, JR., ALVIN SCHONFELD, ARTHUR MORRIS, GERSON D. LUBLIN, WILLIAM P. GREEN, MORRIS HOFFENBERG, NORMA P. LEWINE, JACOB SCHONFELD, MARINA BARUCH DOYLE, LEO M. C. OLIVER, JULIAN BLASS, FLORENCE S. CLAYTON, HATTIE G. MORRIS and HELEN F. SPOONER, doing business under the firm name and style of H. Hentz & Co., a co-partnership, and WILLIAM P. GREEN, individually,

Respondents,

FASHION PARK, INC., *et al.*,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review a decision of the United States Court of

Appeals for the Second Circuit, affirming a judgment granted in favor of the respondents by the Hon. Irving Ben Cooper after a trial without a jury in the Southern District of New York.

Opinions Below

Judge Cooper's opinion is reported at 227 F. Supp. 906. The case was argued in the Court of Appeals before Judges Swan, Waterman and Moore. Judge Waterman wrote the unanimous opinion of the Court which is reported at 340 F. 2d 457. A copyof the opinion also appears at page 264A of the certified record. The order and judgment of the Court of Appeals dated and entered January 4, 1965 appears at page 279A of the record.

Prior to the trial two of the defendants moved for summary judgment which motion was denied by Judge Wyatt in an opinion reported at 222 F. Supp. 798.

Jurisdiction

The suit below was based upon alleged violations of Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) and Rule X-10B-5, promulgated by the Securities and Exchange Commission, 17 C.F.R. § 240, 10b-5.

Federal jurisdiction rests upon the alleged illegal use of the United States mail, the use of the mails being conceded by all parties.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1).

Statute and Rule Involved

The Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. Section 78j(b) provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality

of interstate commerce, or of the mails, or of any facility of any national securities exchange

* * * * * *

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule X-10B-5 adopted by the Securities and Exchange Commission, 17 CFR, Sec. 240, 10(b)-5, provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(1) to employ any device, scheme or artifice to defraud,

"(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Statement of the Case

Defendants below on November 17, 1960, purchased from Albert A. List, the plaintiff, a block of 5100 shares of a corporation known as Fashion Park, Inc., at a price of

$18.50 a share, and approximately three weeks thereafter, December 7, 1960, defendants arranged to sell the stock to Hat Corporation of America at $50 a share, which sale was later completed.

In the purchase of the stock defendants failed to inform List, the seller, that defendant Lerner, the principal buyer, was a director of Fashion Park, Inc., the corporation whose stock was being sold, and defendants failed to inform the seller of certain other facts and circumstances which induced the defendants to buy, including, among other things, that Lerner, the buyer, was a director and an insider, that there was a potential buyer of the business or of the stock of the business, and that the directors of Fashion Park, Inc. adopted a resolution on November 4, 1960 in which the defendant Lerner participated, which resolution declared that Fashion Park had determined to sell to or merge with any buyer (Ex. 2B, 90a). After List discovered defendants' failure to disclose the information in their possession at the time of the sale, he began this action for damages in the sum of $160,293.00.

Prior to the trial, a motion made by defendants Green and Hentz & Co. for summary judgment was denied by Hon. Inzer B. Wyatt, D. J. (222 F. Supp. 798).

It is respectfully submitted that this decision denying motion for summary judgment is strongly in support of this petition (Judge Wyatt's opinion was completely ignored by the courts below).

I.

Certiorari should be granted in this case for the following reasons:

(a) The decision of the Court of Appeals destroys the intent of the Securities and Exchange Act of 1934 and the rules and opinions of the Securities and Exchange Commission thereunder by infusing into

the Act common law principles Congress intended to exclude.

(b) The decision of the Court of Appeals is contrary to and in conflict with the doctrine promulgated by the Supreme Court in *SEC* v. *Capital Gains* (1963), 375 U. S. 180; it also is contrary to the holding of the District Court in the Third Circuit in *Speed* v. *Transamerica Corp.* (D. Del. 1951), 99 F. Supp. 808; it also is in conflict with the principles of law applicable to the situation enunciated by the Supreme Court in *Strong* v. *Repide,* 213 U. S. 419 (1908).

(c) The decision of the Court of Appeals relieves the inside buyer of his obligation to disclose information, and is contrary to the interpretation of the Act and Rules in the *Capital Gains* case, *supra,* and in effect places on the potential seller at his peril an obligation to inquire and seek information.

II.

Questions presented for review.

Authorities and argument in support of questions for review:

ONE

The courts below refused to follow the doctrine of the *Capital Gains* case, *supra,* namely, that Congress in enacting the 1934 Act intended a broad remedial construction of the legislation which would completely cover the failure of an insider or fiduciary to disclose material facts by imposing a stricter liability than existed prior thereto.

The courts below herein seem to differentiate between the proof necessary in a disciplinary proceeding and that necessary to prove a civil action at law.

The *Capital Gains* case, *supra*, makes no such distinction. The test applied in the *Capital Gains* case is whether or not the defendant was violating the law.

TWO

To the doctrine set forth in the *Capital Gains* case, *supra*, the Court of Appeals in the case at bar has added a requirement that the victim cannot recover unless he has taken affirmative precautions to avoid the injury, such as (a) satisfying himself beforehand and without having been alerted, that the party that he is dealing with is not a director of the company; (b) making sure that the independent broker or finder attempting to make the deal has not concealed anything from him. Seller beware.

Judge Waterman stated (p. 275a):

> "That the outsider did not have in mind the negative of the fact undisclosed to him, or that he did not put his trust in the advice of the insider, would tend to prove that he would not have been influenced by the undisclosed fact even if the insider had disclosed it to him."

It is respectfully submitted that this is a confusing and contradictory statement. The first of the alternatives is:

> "That the outsider did not have in mind the negative of the fact undisclosed to him * * * (it) would tend to prove that he would not have been influenced by the undisclosed fact even if the insider had disclosed it to him."

The statement would seem to be a non-sequitur. The court therein places the burden on the outsider at his peril and without being alerted to find out all facts and entirely relieves the insider from the obligation to disclose.

The second of the above alternatives is:

> "That the outsider * * * did not put his trust in the advice of the insider, would tend to prove that he would not have been influenced by the undisclosed fact even if the insider had disclosed it to him." (p. 275a)

This alternative has no more virtue than the first.

In the case at bar there was no express representation by defendants to plaintiff. The complaint is not based upon something defendants did state. It is based entirely upon the fact that defendants completely failed to disclose information within their control and possession.

The Court of Appeals held that an essential of a cause of action under the Act is misrepresentation plus the fact that plaintiff relying upon the representation acted as a reasonable man. In the words of Judge Waterman:

> "Thus, to the requirment that the *individual plaintiff* must have acted upon the fact misrepresented, is added the parallel requirement that a *reasonable man* would also have acted upon the fact misrepresented." (272a)

And Judge Waterman states that the aim of the rule in a case such as this is not to establish "a scheme of investors insurance" (273a-274a).

But the learned judge did not explain how the same doctrine applied where there was a total failure to speak. What can the test be of the reasonableness of the non-receipt when the information is not given? Was it not the intention of the Congress that the duty placed upon the insider is an affirmative duty to disclose?

Kardon v. *National Gypsum Co.* (E. D. Pa. 1947), 83 F. Supp. 613, 614;

Speed v. *Transamerica Corp.* (D. Del 1951), 99 F. Supp. 808;
Vol. III, Loss, pages 1456-7;
Hughes & Co. v. *SEC* (C. A. 2d 1943), 139 F. (2d) 434, 436;
Weber v. *Sec. & Exch. Comm.* (C. A. 2d 1955), 222 F. (2d) 822.

Judge Waterman would seem to require that a plaintiff must prove that *if he had the information* which he did not get he would have acted differently from the way in which he acted, and that he would have been a reasonable man in so doing.

The Court of Appeals erred in adopting the Trial Court's finding (1) That List would have sold even if he had the information that one of the buyers was a director of Fashion Park, and (2) that the undisclosed resolution that Fashion Park be sold or merged was not a material fact (269a). List testified flatly and directly that he would not have sold had he known that Lerner, a director, was the purchaser (56a-57a and 59a). That he would not have sold if he had known of the adoption of the resolution of November 4, 1960. The Trial Court during the trial indicated that it was important to any shareholder to know that a director or other insider was the buyer of his stock (56a-57a).

Since the resolution of November 4, 1960, directed the Rosenbergs, the majority stockholders of Fashion Park, Inc., to merge or sell, and since it was followed soon thereafter by an offer of $50 a share by Hat Corporation, it would seem that results had proven the contention that adoption of the resolution of November 4th was indeed a material fact.

Lerner appreciated the importance of the November 4, 1960 resolution, yet he did not inform the seller that it had been adopted.

Lerner testified that he did not consider it necessary to inform the seller that he was a director of the company or of any other circumstances or conditions of the company (246a).

But Lerner also testified that he had told Chatman, the Labor Leader, that the removal of the Fashion Park employees "was literally forcing the company out of business" (208a).

As an alternative the directors, with the concurrence of the Rosenbergs, voted immediately to seek a sale or merger of the company. It was the most important happening in the life of the corporation. A sale or merger meant that the Rosenbergs were at last dislodged from the management of the corporation. Yet, the court below ruled that defendants were not obliged to disclose the adoption of that resolution to the stockholder from whom they proposed to buy a block of 5100 shares of stock, out of a total issue of approximately 60,000.

Whether the information would cause the seller to raise his estimate of the value of the stock or, on the other hand, to lower such estimate, it was solely for the seller to decide. At any rate, the seller should have been advised of the adoption of the resolution to enable him to reach his own decision as to whether or not the price that was being negotiated by the free lance broker was a fair and adequate price.

THREE

Judge Waterman points out that one of the grounds of the Trial Court's decision was "that the undisclosed possibility that Fashion Park might be sold was not a material fact" (269a).

Petitioner does not rely on the failure to disclose that Fashion Park might be sold, as elsewhere stated; defendants disclosed nothing except that Hentz & Co. (Green) had a buyer ready, able and willing to buy at $18.50 a share.

But the proposition of "materiality" runs through the opinion of the Trial Court and that of the Court of Appeals. The Court of Appeals said:

> "We affirm the decision of the trial court rejecting the claim that plaintiff was damaged through defendants' non-disclosure." (269a)

The Court assumed "there was a total non-disclosure" by defendants (270a).

Judge Waterman then proceeds to define "reliance" and "materiality" (272a).

Having already concluded that there was a complete failure on the part of the defendants herein to disclose, and that failure to disclose is a violation of the Act (272a) Judge Waterman then proceeds to measure this non-disclosure situation by principles that apply in a common law action of misrepresentation.

He quoted from *Restatement Torts*, Sec. 546, "the misrepresentation is a substantial factor in determining the course of conduct which results in [the recipient's] loss". But the case at bar does not represent a misrepresentation situation but rather a failure to disclose situation.

It is respectfully submitted that List could not have relied on facts or representations that were not revealed to him and never entered his mind.

FOUR

It is further respectfully submitted that Judge Waterman strayed from the proposition before the Court in his discussion of "reliance" and "materiality" (272a-273a).

Since it is conceded that defendants made no representations, the question before the Court should have been confined to a situation of complete silence on the part of the defendants.

Since there was no representation by the defendants there could be no false representations, except by the failure or omission to state material facts, *Strong* v. *Repide, supra.* Since there were no representations there could be no reliance thereon by plaintiff List.

The sole question was not one of falsity of representations or reliance thereon, but the sole issue was that under the provisions of the Act and the Rules of the Commission there was an affirmative duty on the part of the defendants to speak. The information that defendants had and plaintiff did not have was of the type that it would have influenced the seller's decision to sell or not to sell.

FIVE

The resolution of November 4, 1960, reasonably predicted a change in the status of the stock. Since it was generally known that the depreciated condition of the stock was due to lack of management any prospect of change of management was mighty important.

Lerner must surely have believed that the frozen status of the management was a *material fact* and clearly against the interests of the stockholders. We refer again to the minutes of the meeting of May 16, 1960 (Ex. 2A, 85a), at which meeting he and another director advocated sale or merger.

The mere fact that the resolution of November 4, 1960, was forced on the Rosenbergs would in itself indicate that it was "material" to the corporation and to all its stockholders whether or not it was beneficial.

SIX

It is respectfully submitted that the courts below were wrongly influenced by the requirements of an action for fraud and deceit in which a necessary element of proof is the affirmative misleading of the victim.

On this point Professor Loss's opinion is directly contrary to the holding of the courts below:

> "He does not have to prove 'reliance' on the misstatement or omission; he must show only that he did not know of it, which is presumably a lesser burden" (Loss, p. 1702).

In *Kardon* v. *National Gypsum Co.* (E. D. Pa. 1947), 73 F. Supp. 798, 802, the Court stated:

> "Plaintiffs' case was established when the defendants' duty and its breach was proved."

Judge Wyatt had rightly pointed out that there was no dispute that Hat Corporation had shown its interest prior to November 17th, the date of the purchase of the List stock even though Hat Corporation did not make an offer prior to that date, and even though its name had not been made known to defendants (Wyatt, J., Op. 31a).

There can be no hard and fast rule that in every situation the existence in the background of a willing buyer is of importance only if he has already made a definite offer. Under the circumstances that herein existed, the mere statement by the labor leader, Chatman, to the board of directors on November 4, 1960, of the existence of a prospective buyer or a new competing manufacturer was an influential and contributing fact to the adoption of the resolution to sell or merge. Within a matter of hours the Board had adopted the resolution to merge or sell. The minutes recite:

> "• • • it was the consensus of all that an effort should be made to sell or merge the business either with the

person Chatman had in mind or anyone else who had an interest" (89a).

Things moved swiftly thereafter. Hentz & Co. (Green) entered Sheets bidding for the stock, and Lerner increased his bid immediately. By December 1st, Hat Corporation had indicated an offer of $50 a share, and on December 7th it had released publicity that it was offering $50 a share. One step followed another. The road block to progress had been removed.

SEVEN

The Court of Appeals was in error in refusing to pass upon the issue of *implied representation*, wrongly stating that it was not presented to the Trial Court.

At page 269a, Judge Waterman stated:

> "Finally, upon appeal, he (plaintiff) now alleges for the first time that defendants impliedly misrepresented to him that the stock he sold was worth only $18.50 per share. * * * As for the allegation of misrepresentation, we decline to consider a claim not presented to the trial court which raises substantial issues of fact, requiring resolution, such as the ascertainment of the true value of plaintiff's shares on November 17, 1960."

Judge Waterman was mistaken in his assumption that the point had not been presented to the Trial Court.

At page 16 of plaintiff's Trial Brief, which was in the hands of the Trial Court, it was stated:

> "Professor Loss goes so far as to state: '* * * the insider's offer to purchase at a fixed price might be deemed to constitute an implied representation that, within reasonable limits, the stated price represents the insider's judgment of the value of the security.'" V. III, Securities Regulation, pp. 1456-7)

At page 17 of the Trial Brief the plaintiff stated:

> "The concealment in the case at bar is similar to the concealment by an over-the-counter dealer who neglects to state to a customer the market price of a stock when he is selling such customer such stock at a price above the market."

The Trial Brief also contained the following:

> "In *Hughes & Co.* v. *SEC.*, 139 F. (2d) 434, 436 (C.C.A. 2d), the Court had before it the cancellation of the Hughes charter as a dealer and broker by the Securities & Exchange Commission. The broker appealed to the Circuit Court of Appeals (2d Cir.).
>
> The Court held that a dealer in such a situation must 'be deemed to commit a fraud' by non-disclosure."

Still quoting from the Trial Brief and referring to the *Hughes* case:

> "The Court of Appeals (Clark, J. Agustus N. Hand and Chase, J.J., concurring) pointed out that although there was no finding of false statement on the part of Hughes & Co., there was a failure to disclose important information, namely, *that the price was substantially above the market.*" (Emphasis supplied)

Judge Waterman stated that the proposition raised substantial issues of fact requiring determination of the true value of plaintiff's shares on November 17, 1960 (269a).

It is respectfully submitted that there was plenty of evidence before the courts below as to the value of plaintiff's shares on November 17, 1960. Among the evidence in the record from which the Court might well have arrived at a sufficiently fair value of plaintiff's stock were the following:

Defendants bought the stock at $18.50 a share.

Defendants received $50 a share, and the offer therefor was made on December 7, 1960, two weeks after the purchase of plaintiff's stock.

The book value was conceded to be from $56 to $60 a share (61a).

The Annual Report of the corporation for 1959 was in evidence (Ex. 1).

In *Speed v. Transamerica,* 99 F. Supp. 808, 843, Judge Leahy stated:

> "In making an offer of 33⅓% above the current market price defendant impliedly represented that the price offered was a fair price at that time."

The *Speed* case, *supra,* was a representative action and all stockholders in the same class were entitled to recover.

Judge Waterman distinguished the *Speed* case in the following manner (273a):

> "Plaintiff also relies on the fact that in *Speed* v. *Transamerica Corp.,* 99 F. Supp. 808, 833, the court allowed a class action by the defrauded sellers, from which fact he infers that no inquiry into the reasons why each seller transferred his stock is required by Rule 10b-5. However, a comparison of that decision with the opinion in an earlier phase of the same suit, *Speed* v. *Transamerica Corp.,* 5 F.R.D., 56, 60, shows that a class action was allowed only because the court was convinced that all members of the class had relied on defendant's misrepresentation."

It is difficult to find what in the earlier report of *Speed* v. *Transamerica, supra,* convinced the Court that all members of the class had relied on defendants' misrepresentation.

We respectfully submit that the record in the *Speed* v. *Transamerica* case (a class action), indicates that the Court recognized the liability of the insider defendant to disclose even though the remaining outside stockholders had offered no evidence of defendant's non-disclosure.

Petitioner asks for no clearer statement of the law than that by Judge Leahy in the *Speed* case (99 F. Supp. 828, 829):

> "The rule is clear. It is unlawful for an insider, such as a majority stockholder to purchase the stock of minority stockholders without disclosing material facts affecting the value of the stock, known to the majority stockholder by virtue of his inside position but not known to the selling minority stockholders, which information would have affected the judgment of the sellers. The duty of disclosure stems from the necessity of preventing a corporate insider from utilizing his position to take unfair advantage of the uninformed minority stockholders. It is an attempt to provide some degree of equalization of bargaining position in order that the minority may exercise an informed judgment in any such transaction."

Judge Waterman was mistaken in his statement that Lerner disposed of 3137 shares out of the 4300 purchased by him at a profit of about $1 per share (p. 268a).

Judge Waterman stated that one of the facts that influenced the Trial Court was (276a):

> "* * * that within two weeks after he bought plaintiff's stock defendant Lerner disposed of part of or all of his interest in 3137 of his 4300 shares at an average profit of only $1. per share."

The record does not support the finding.

Lerner testified that on the same date on which he bought 4300 shares of List stock he caused 2000 shares thereof to be transferred to the Victoria Investment Company, Ltd.,

of which he was the largest stockholder, and whose address was in care of Leonard I. Schreiber, his attorney (212a).

Out of the remaining 2300 shares he took 1163 into his own name and later transferred those shares to the Hat Corporation at $50 a share (213a).

Lerner did not place on the record the reason why he took only 1163 shares into his own name, and 2,000 into his Canadian incorporated Victoria Investment Company.

The balance of 1137 shares is the only part that Lerner claimed to have transferred at approximately $1 per share profit. Among those to whom he transferred the 1137 shares were the following:

To Leonard I. Schreiber, who is his attorney in this law suit—100 shares (211a).

To Robert E. Springer, his local attorney in Boston—200 shares (211a, 213a).

To David B. Goldberg, another local representative associated with Springer—100 shares (211a, 213a).

To Joseph Coe, his associate in the Boston business—100 shares.

To Dr. Jordon P. Sandman, a customer of his Boston office—100 shares (213a).

To Irving Kellman, a customer of his Boston office—200 shares.

To Dr. and Mrs. Keller, customers of his Boston office—100 shares.

To Lawrence H. Nathan and his wife (Nathan being an employee of Lerner's office in Boston)—37 shares (211a).

When Lerner was asked what was his investment in Fashion Park prior to the purchase of the List stock, he said:

> "I believe the record would show that I owned approximately 3,600 shares, that my older daughter held

600 shares, that Victoria Investment Company had 2,000 shares, and that I personally owned 30,000 in face value of bonds." (248a)

He agreed that the total investment was about $100,000 or more (248a).

EIGHT

The Court of Appeals wrongfully found that List had actively solicited the sale of the stock to defendants (p. 275a). This came about through the fact that the Court of Appeals wrongfully held that Robinson in his correspondence and conversations with a number of different parties, including Fashion Park, was acting as agent or representative of List, whereas, he was at all times a free lance finder or go-between trying to bring about a meeting of minds between a prospective buyer and a prospective seller.

At all times Robinson was acting on his own as a "finder" seeking to make a deal, and never possessing any authority from List until on November 17, 1960, when he submitted to List an "offer" of $18, which was acceptable to List, if Robinson secured 50 cents additional to pay his commission. Only then did he receive authority and the sale was consummated the same day. Until then Robinson was merely a go-between, acting on his own—not as an agent of List's.

Likewise, the courts below erroneously assumed that the solicitation that resulted in the sale of the stock by List was originated by List or by Robinson on his behalf (268a). Such assumption is contrary to the record.

For years prior to November 1960 Lerner had been accumulating securities of Fashion Park, and when he became a director in May 1960, his accumulation amounted to $100,000.

During the twenty months that List was quietly sitting on his block of Fashion Park stock Lerner was soliciting Fashion Park stock through daily bids in the National Quotation Sheets referred to hereafter as Sheets. On and after November 7, 1960, H. Hentz & Co. (Green) joined Lerner as solicitors of Fashion Park stock through daily bids in Sheets.

It was those bids in Sheets that came to the attention of Robinson, the free lance broker, and it was those bids that caused Robinson to telephone Hentz & Co. (Green) for further information. In the usual and customary method of a free lance broker after Robinson telephoned Green, he then telephoned List and he repeated the procedure until he had an offer of $18 a share from Green, which he submitted to List. It was then, and only then, that List responded to Robinson's urgings to sell (275a).

The defendants were the ones who solicited stock for purchase, and their bids day after day in Sheets was bait for the outsider. In this case it was not a stockholder who found the bait and rose to surface lured by the fisherman, Green. It was Robinson, the free lance middleman who happened to know that eighteen months before he had sold a block of 5,100 shares of the stock to List. It was Robinson, on his own, acting without any authority from List and unknown to List, who contacted Green.

NINE

The Court of Appeals erred in its seeming approval of the action of the Trial Court in holding in effect that an insider owed less duty by way of disclosure to an "experienced and successful investor in securities" than to a novice (see Judge Waterman's Opinion, p. 275a).

This Court in the case of *SEC* v. *Capital Gains, supra,* did not stipulate that there should be exceptions to the rule that compels disclosure.

Professor Loss points out that the credulity or knowledge and experience of the victim is of no importance:

> "* * * omissions to state material facts are not justified by the investor's sophistication or independent knowledge. Leonard Burton Corp., Sec. Ex. Act, Rel. 5978 (1959) 5. This seems like another way of saying that reliance is not an element of the offense under the SEC provision as it is in common-law deceit" (Loss, pp. 1438, 1439).

TEN

The Court of Appeals completely ignored the fact that there was an unknown buyer lurking in the background. Chatman, the labor leader, had revealed this fact to the Rosenbergs in October, and on November 4th, 1960, at the board of directors meeting of Fashion Park he stated that he had a manufacturer whom he proposed to bring into Rochester, or who would be interested in purchasing the stock of Fashion Park, whose name he would not disclose until he had a commitment by the board of directors that the majority stockholders would sell. He disclosed the name of this proposed purchaser to Rosenberg, Jr., on November 14, 1960, ten days after the resolution had been adopted. The manufacturer was Hat Corporation of America (Ex. 2B, p. 88a).

ELEVEN

Conspiracy was not an essential element of plaintiff's case.

In *Lewis Invisible S. Mach. Co.* v. *Columbia B. Mach. Mfg. Co.*, 80 F. (2d) 862, Judge Learned Hand, at page 864, clearly stated the law involved:

> "So far as the counterclaim pleads conspiracy at common law it was not a cause of suit independent of the tortious conduct involved in its execution. Whatever

may be the rule in criminal conspiracies, it is well settled that the civil liability does not depend upon the confederation (which need be alleged only by way of inducement), but upon the acts committed in realization of the common purpose."

See also:

Motley Green & Co. v. *Detroit Steel & Spring Co.* (S.D.N.Y., 1908), 161 Fed. 389;
Morris v. *National Association of Stationers* (C. A. 7th 1930), 40 F. 2d 620.

The charge of conspiracy in the case at bar is not the basis of the action, but the violation of the Federal Statute and Rule X10B-5, is the basis of the action.

Radford v. *U. S.* (C. A. 5th 1959), 264 F. (2d) 709;
Morris v. *National Association of Stationers, supra.*

Whether or not proof of conspiracy was essential, petitioner does not admit that proof is lacking. The records show that defendants acted in unison in purchasing and dividing up plaintiff's stock.

Defendants at the time were violating the terms of the Act in question, their mutual efforts to violate the law were clearly a conspiracy.

TWELVE

The Court of Appeals completely disregarded many undisputed facts to reach a conclusion that plaintiff was not entitled to judgment against the defendant Lerner and Green for the amount demanded in plaintiff's complaint together with interest from November 17, 1960.

Judge Waterman for the Court of Appeals said:

> "Neither plaintiff nor his broker knew that H. Hentz & Co. were brokers for a Fashion Park director who was one of the purchasers of the stock, or that the company's management was considering the sale of the company." (p. 268a)

This finding by the Court of Appeals coupled with the other undisputed facts makes the defendants Lerner, Green and H. Hentz & Co. liable for their failure to disclose any material facts to their knowledge and not within the knowledge of the plaintiff List.

It is undisputed that on November 7, 1960 defendant Lerner raised his offer in the Sheets, and H. Hentz & Co. on the same day through defendant Green went into the Sheets for the first time.

November 7th (a Monday) was the next business day after the meeting of Friday, November 4, 1960 when the resolution was unanimously passed by the directors of Fashion Park ordering the management to sell or merge the company.

The undisputed evidence is that Lerner was elected a director of Fashion Park on May 12, 1960 and attended his first meeting of directors of Fashion Park four days later, to wit, May 16, 1960 (Ex. 2A, p. 83a). At this meeting he and another director urged management of Fashion Park to sell or merge the company but Lerner did not accomplish his purpose until the resolution was passed on November 4, 1960 and the roadblock was removed so that the company could secure new management to replace the inefficient management of the Rosenbergs (Ex. 2B, p. 87a).

It is undisputed that List purchased his shares from Kidder, Peabody & Co. in January 1959. Shortly after his purchase, he asked Robinson, the free lancer who brought the opportunity to him, if it were possible, to buy

control of Fashion Park as it was evident that Fashion Park's troubles were due entirely to management. On being informed that the Rosenbergs would not sell, List did nothing about his stock until Robinson called to his attention Exhibit 5 (p. 95a) when Rosenberg wrote Seligson on October 31, 1960 that the company was not for sale.

List had no knowledge, as Judge Waterman pointed out, that the company's management was considering the sale of the company; yet, on November 4, 1960 the resolution to sell or merge the company was passed by Lerner and his fellow directors.

List then sat with his stock until November 17, 1960 when Robinson advised him he had an offer of $18.50 per share for the 5100 shares. Then and only then (p. 58a) did he authorize Robinson to sell the shares; and again referring to Judge Waterman's finding List had no knowledge that 4300 shares were being purchased by H. Hentz & Co. for Lerner, the director, and 800 shares for Green and his family.

It is undisputed that Lerner and William P. Green were co-workers on this deal; that they were both specialists in discount situations; that Green and Lerner had been conferring for many months before November 4, 1960 in regard to Fashion Park and were in daily contact with each other, not only on the Fashion Park situation but on many other transactions (68a, 74a).

Green, even after Hat Corporation had made the offer of $50 a share for Fashion Park's stock, purchased 200 shares from customers of H. Hentz & Co. without disclosing that Hat Corporation were actually committed to a $50 price (80a).

Green testified (74a) that Lerner and he talked almost every day; that it was normal business to be in constant touch with each other. (See also 60a, 68a and 69a.)

In fact, Green testified he discussed Fashion Park with Mr. Lerner a year before he actually bought any stock (61a).

Lerner recognized the necessity of advising any outside purchaser of Fashion Park stock from Lerner, that he must give notice to the outsider that Lerner was a director of Fashion Park, Inc. (defendant Lerner's Ex. H, 102a). A rubber stamp appears on each confirmation sheet that he issued to alleged purchasers of a part of the List stock which reads as follows:

> "Mr. Louis C. Lerner of our firm is a director of the above corporation."

This stamp specifically refers to List's Fashion Park stock. Lerner testified that he placed this stamp or caused it to be placed on the sale of every share of stock of any company in which he was a director (81a).

He further testified on the same page that he put the stamp on these exhibits on advice of counsel but he did not seek advice of counsel at the time he was purchasing List's stock or a part thereof. Lerner did not testify that he put the stamp on similar exhibits when he purchased stock from outside stockholders in corporations in which he was an insider.

Coupling these admitted facts with the opinion of the Court of Appeals, it is respectfully urged that the courts below were in error in finding against the plaintiff.

Conclusion

It is respectfully submitted that the decision of the Court of Appeals failed in its entirety to follow the principle set down by this Court in the *Capital Gains* case, *supra,* and imposes upon all non-alerted outside stockholders an obligation [in order to protect themselves against machinations of insiders] without having been

alerted, to make a thorough search to discover whether or not the insider is deliberately utilizing to his own advantage facts and information not known to the outsider.

If the mandate embodied in the Statute, the SEC Rule and the decisions of this Court are to retain vitality, this Court's attention is urgently needed on this application.

A Writ of Certiorari should accordingly be granted.

Respectfully submitted,

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